

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TERRANCE L. LAVOLL,

Petitioner

v.

JERRY HOWELL, et al.,

Respondents.

Case No.: 2:19-cv-02249-GMN-EJY

Order Granting Motion to Dismiss

(ECF No. 49)

In his 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus Terrance L. Lavoll challenges his conviction for sexual assault and solicitation of minors. (ECF No. 17.) In the claims remaining before the Court he alleges trial court error and that his trial counsel was ineffective. Respondents have filed a Motion to Dismiss arguing that Ground 1 is procedurally barred. (ECF No. 49.) Because Ground 1 is procedurally barred and Lavoll cannot demonstrate cause and prejudice to overcome the default, Ground 1 is dismissed.

I. Background

In October 1997, an Eighth Judicial District (Clark County) jury convicted Lavoll of one count of Sexual Assault of a Minor under 16, two counts of Sexual Assault of a Minor under 16 with a Deadly Weapon, and one count of Solicitation of Minor to Engage

1 in Acts Constituting Crimes Against Nature. (Exhibit 16.)¹ The state district court
2 sentenced Lavoll to terms that amount to 60 years to life. (Exh. 21.) Judgment of
3 Conviction was entered on January 6, 1998. *Id.*

4 The Nevada Supreme Court affirmed Lavoll's convictions in April 2000 and
5 affirmed the denial of his state postconviction habeas corpus petition in November
6 2007. (Exhs. 52, 99.) In November 2010, this Court denied Lavoll's first federal habeas
7 petition on the merits. (Case No. 2:08-cv-00011-PMP, ECF No. 42.)

8 In July 2012, an Amended Judgment of Conviction was entered that added a
9 special sentence of lifetime supervision. (Exh. 101.) In March 2018, Lavoll filed a
10 second state postconviction petition. (Exh. 103.) The state appellate court affirmed the
11 denial of that petition as procedurally barred in May 2019. (Exh. 123.)

12 Lavoll dispatched his current Federal Habeas Corpus Petition for filing in
13 November 2019. (ECF No. 1). This Court granted his Motion for Appointment of
14 Counsel, and he ultimately filed a counseled First Amended Petition in February 2021.
15 (ECF Nos. 12, 17). Lavoll raised four claims:

16 Ground 1: Lavoll was denied the right to choose whether to
17 concede guilt at trial in violation of his right to choose the objective
of the defense under the Sixth and Fourteenth Amendments.

18 Ground 2: Lavoll's trial counsel was ineffective in violation of his
19 Sixth and Fourteenth Amendment rights for failing to object to the
prosecution's inflammatory statements in closing arguments.

20 Ground 3: Lavoll's Fifth and Fourteenth Amendment due process
21 rights were violated because the judgment does not indicate a
minimum term of his sentence.

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¹ Exhibits referenced in this order are exhibits to Respondents' First Motion to Dismiss, ECF No. 19, and Second Motion to Dismiss, ECF No. 49, and are found at ECF Nos. 20-22, 50.

1 Ground 4: Lavoll's Fifth, Sixth, and Fourteenth Amendment rights to
2 be present was violated when the state district court sentenced him
in his absence.

3 (ECF No. 17.)

4 Respondents filed their first Motion to Dismiss in April 2021. (ECF No. 19.) The
5 Court dismissed Grounds 3 and 4 as procedurally barred. (ECF No. 34.) The Court
6 held that Ground 1 was unexhausted and also deferred a decision on whether Ground 2
7 is procedurally barred from federal review to the merits adjudication. The Court granted
8 Lavoll a stay of these proceedings, and he filed a (third) successive habeas petition in
9 state court in December 2022, in an effort to exhaust Ground 1. (ECF No. 43; Exh. 125.)
10 In September 2023, the Nevada Court of Appeals affirmed the denial of the third state
11 petition as untimely, an abuse of the writ, and based on laches. (Exh. 138.) The
12 appellate court rejected Lavoll's arguments that he could overcome the state procedural
13 bars. This Court reopened this case, and Respondents now move to dismiss Ground 1
14 as procedurally defaulted. (ECF No. 49.)²

15 II. Discussion

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17 "Procedural default" refers to the situation where a petitioner in fact presented a
18 claim to the state courts, but the state courts disposed of the claim on procedural
19 grounds, instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).
20 A federal court will not review a claim for habeas corpus relief if the decision of the state
21 court regarding that claim rested on a state law ground that is independent of the
22 federal question and adequate to support the judgment. *Id.*

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² Lavoll opposed, and Respondents replied. (ECF Nos. 51, 54.)

1 The *Coleman* Court explained the effect of a procedural default:

2 In all cases in which a state prisoner has defaulted his federal
3 claims in state court pursuant to an independent and adequate state
4 procedural rule, federal habeas review of the claims is barred unless the
5 prisoner can demonstrate cause for the default and actual prejudice as a
6 result of the alleged violation of federal law or demonstrate that failure to
7 consider the claims will result in a fundamental miscarriage of justice.

8 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

9 The procedural default doctrine ensures that the state's interest in correcting its own
10 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d
11 1039, 1046 (9th Cir. 2003).

12 To demonstrate cause for a procedural default, the petitioner must be able to
13 "show that some objective factor external to the defense impeded" his efforts to comply
14 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). The external
15 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
16 *v. Zant*, 499 U.S. 467, 497 (1991).

17 ***Ground 1 is procedurally barred from federal habeas review.***

18 In Ground 1 Lavoll argues that he was denied the right to choose whether to
19 concede guilt at trial in violation of his right to choose the objective of the defense under
20 the Sixth and Fourteenth Amendments. (ECF No. 17 at 7-10.) He argues that his
21 counsel conceded during closing arguments that Lavoll was guilty of the lesser offense
22 of statutory sexual seduction though Lavoll never agreed to this concession.

23 Lavoll relies on *McCoy v. Louisiana*, where the Supreme Court held that defense
counsel's concession of guilt, when the accused wished to maintain his innocence,
violated the accused's Sixth Amendment right to choose the objective of the defense.
138 S.Ct. 1500 (2018). In *McCoy* the Court explained that "[b]ecause a client's

1 autonomy, not counsel's competence, is in issue, we do not apply our ineffective-
2 assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668 (1984), or
3 *United States v. Chronic*, 466 U.S. 648 (1984)" *Id.* at 1510-1511.

4 Lavoll presented this claim to the state courts in his third state postconviction
5 petition. (Exhs. 125.) He also argued that *McCoy* provided him good cause to file the
6 untimely and successive state petition. The state district court rejected the good cause
7 argument, finding that even if it accepted Lavoll's position that *McCoy* gave him good
8 cause to file a successive state postconviction petition after it was decided in 2018, he
9 provided no explanation or authority as to why the state courts should allow him to file
10 the petition four years after the *McCoy* decision. (Exh. 131.) The court further rejected
11 the argument that Lavoll would be prejudiced by the court not considering his *McCoy*
12 claim. The court pointed out that in 2007 the Nevada Supreme Court affirmed the
13 denial of the claim in Lavoll's first state petition that trial counsel was ineffective for
14 conceding guilt, finding that Lavoll failed to demonstrate deficiency or prejudice. So the
15 state district court concluded that Lavoll could not show he would be prejudiced by the
16 court not considering his *McCoy* claim.

17 The Nevada Court of Appeals affirmed the denial of the successive state petition
18 as procedurally defaulted because it was untimely under NRS 34.726, an abuse of the
19 writ in violation of NRS 34.810, and barred by laches under NRS 34.800. (Exh. 138.)
20 The appellate court stated that Lavoll failed to demonstrate good cause because he did
21 not explain why he waited more than four years after the *McCoy* decision was issued to
22 file the second state petition. So Respondents argue that federal Ground 1 is now also
23 procedurally barred from federal habeas review. (ECF No. 49 at 4-5.)

1 The Ninth Circuit Court of Appeals has held that, at least in non-capital cases,
2 application of the procedural bars at issue in this case are independent and adequate
3 state grounds. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see also*
4 *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999). Respondents argue that the
5 Nevada Court of Appeal's determination that federal ground 1 was procedurally barred
6 under NRS 34.726, 34.810 and 34.800 were independent and adequate grounds to
7 affirm the denial of the claims in the state petition.

8 Lavoll argues that the manner in which the state appellate court applied the time
9 bar in his case was not clear and well-established. (ECF No 51 at 5-8.) But NRS
10 34.726 is an adequate state procedural bar. *Williams v. Filson*, 908 F.3d 546, 577-80
11 (9th Cir. 2018); *Loveland v. Hatcher*, 231 F.3d 640, 643-44 (9th Cir. 2000); *Moran v.*
12 *McDaniel*, 80 F.3d 1261 (9th Cir. 1996) (holding that the Nevada Supreme Court has
13 consistently applied the state rule prohibiting review of the merits of an untimely claim
14 unless the petitioner demonstrates cause). Further, the state appellate court also held
15 that Lavoll's third state petition was procedurally barred as an abuse of the writ and by
16 laches. In any event, it is now clear that *McCoy v. Louisiana* is not retroactive to cases
17 on collateral review. *Christian v. Thomas*, 982 F.3d 1215, 1225 (9th Cir. 2020). So
18 Lavoll would not be able to demonstrate prejudice to overcome procedural bars.

19 Lavoll also argues that he can overcome the default under *Martinez v. Ryan*. 566
20 U.S. 1 (2012). In *Martinez*, the Supreme Court held that the failure of a court to appoint
21 counsel, or the ineffective assistance of counsel in a state postconviction proceeding,
22 may establish cause to overcome a procedural default in specific, narrowly-defined
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1 circumstances. The Court explained that *Martinez* established a “narrow exception” to
2 the *Coleman* rule:

3 Where, under state law, claims of ineffective assistance of trial counsel
4 must be raised in an initial-review collateral proceeding, a procedural
5 default will not bar a federal habeas court from hearing a substantial claim
6 of ineffective assistance at trial if, in the initial-review collateral proceeding,
7 there was no counsel or counsel in that proceeding was ineffective.

8 *Id.* at 17.

9 But as Respondents point out, Ground 1 is not a claim of ineffective assistance of
10 trial counsel, the only type of claim to which the narrow exception established in
11 *Martinez* may apply. Lavoll asks this Court to expand *Martinez*’s reach to an underlying
12 substantive claim of trial error. But the *Martinez* Court repeatedly stressed the limited
13 nature of its holding. (See *id.* at 15 (“this limited qualification of *Coleman*”); at 16 (“[t]he
14 rule of *Coleman* governs in all but the limited circumstances recognized here”).
15 Moreover, this claim was raised in Lavoll’s third state petition, not an initial-review
16 collateral proceeding. But the holding in *Martinez* “does not concern attorney errors in
17 other kinds of proceedings, including appeals from initial-review collateral proceedings
18 [or] second or successive collateral proceedings.” (*Id.* at 16.) Lavoll cannot rely on
19 *Martinez* to overcome the default of the *McCoy* claim. And, again, *McCoy* is not
20 retroactive to cases on collateral review. *Christian*, 982 F.3d at 1215. Accordingly,
21 Ground 1 is dismissed.
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